

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN BROOKS)	
Claimant)	
VS.)	
)	
PRESTIGE)	Docket Nos. 1,030,237
)	& 1,030,238
Respondent)	
AND)	
)	
TRAVELERS PROPERTY CASUALTY COMPANY)	
OF AMERICA and WAUSAU UNDERWRITERS)	
INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier Wausau Underwriters Insurance Company request review of the January 26, 2007 preliminary hearing Orders entered by Administrative Law Judge Thomas Klein.¹ Claimant was awarded medical treatment for an injury to his left shoulder after the Administrative Law Judge (ALJ) determined that claimant's injury was not a new injury, but instead a natural and direct consequence of his original injury.

ISSUES

The ALJ found that no new injury occurred and that claimant's current continuing problems are a natural and direct consequence of his original injury.

Respondent and its insurance company, Wausau Underwriters Insurance Company, argue that claimant's need for medical treatment to his left shoulder is not directly related to the injury to the claimant's right shoulder and that there is no medical evidence

¹ The ALJ filed two separate Orders on January 26, 2007. One Order was in Docket No. 1,030,237. The other Order was in Docket No. 1,030,238.

supporting the ALJ's finding that claimant's need for treatment to the left shoulder is due to the right shoulder injury.

Claimant argues that the Order of the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in August 2004 as a ribbon planner. This job required that claimant pick up materials weighing up to 75 pounds on a regular basis. Claimant began having bilateral shoulder problems in April 2005, with claimant's right shoulder being worse than his left. Claimant was initially treated by F. Allen Moorhead, Jr., M.D., for problems with his right shoulder. Claimant was then referred to orthopedic surgeon Harry A. Morris, M.D., of Advanced Orthopedic Associates. On September 2, 2005, while under Dr. Morris's care, claimant underwent a rotator cuff repair of the right shoulder on September 2, 2005, with a second surgery for debridement of scar tissue on August 8, 2006. Claimant testified that his left shoulder was also bothering him, but not to the degree of his right shoulder. Dr. Morris provided no treatment for the left shoulder.

A preliminary hearing was held on December 13, 2006, at which time claimant requested treatment for his left shoulder. The dispute centers around whether claimant's left shoulder injuries are a natural consequence of his original injuries, or the result of a new injury or series of injuries. Respondent changed insurance companies on March 1, 2006, when Travelers Property Casualty Company of America replaced Wausau Underwriters Insurance Company as respondent's workers compensation carrier.

Claimant has filed two claims against this employer. The first E-1 Application For Hearing was filed on August 4, 2006 (Docket No. 1,030,237), alleging a series of injuries to both of claimant's shoulders beginning April 11, 2005, and continuing thereafter. The second E-1 Application For Hearing was also filed on August 4, 2006 (Docket No. 1,030,238), alleging injuries to both of claimant's shoulders beginning July 12, 2006, and continuing thereafter. Respondent and its insurance company, Wausau Underwriters Insurance Company, admit liability coverage for the right shoulder. The dispute over the liability for the left shoulder centers around the appropriate date of accident, which the ALJ did not determine in the Orders of January 26, 2007. The ALJ simply determined that claimant's left shoulder injuries were a natural and direct consequence of his original injury, with no additional explanation provided.

Claimant testified that his current left shoulder problems began in 2005, but his treatment focused entirely on the right shoulder because the right was the more severe. Claimant went on to say that his left shoulder pain has progressively worsened up to and even after August 2006 as a result of his work activities with respondent. At the time of his deposition on November 20, 2006, claimant testified that his work activities, and specifically the lifting, bothered both shoulders.

Dr. Morris made in clear, in his October 2, 2006 letter to Wausau Underwriters Insurance Company, that claimant had not suffered a new injury to his right upper extremity. Instead, the right shoulder problems were described as a “continued consequence of his original problems and first surgery”.² But then, Dr. Morris went on to state that claimant’s left shoulder complaint was not a consequence of any injury to his right shoulder, but was a “new injury”.³

The only other health care provider who provided a report in this matter was Edward J. Prostic, M.D., who examined claimant at the request of claimant’s attorney. Dr. Prostic commented that claimant had sustained injuries to both shoulders while working for respondent, but provided no opinion regarding whether this is a new injury or a natural consequence of the original injuries.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board’s jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁴

It is undisputed that claimant has suffered work-related injuries to his left shoulder. The dispute in this matter centers around whether claimant’s left shoulder injuries are a

² P.H. Trans., Resp. Ex. 1.

³ *Id.*

⁴ K.S.A. 44-534a(a)(2).

natural consequence of earlier injuries to his right upper extremity or the result of new injuries suffered while working for respondent.

This is not an issue over which the Board takes jurisdiction on appeal from a preliminary hearing. Therefore, the appeal by respondent and its insurance carrier, Wausau Underwriters Insurance Company, should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Orders of Administrative Law Judge Thomas Klein dated January 26, 2007, remain in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of April, 2007.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier Wausau Underwriters Insurance Company
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier Travelers Property Casualty Company of America
Thomas Klein, Administrative Law Judge

⁵ K.S.A. 44-534a.